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OFFICE OF THE CLERK

No. _____ .

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ABELE ASSOCIATES, a Pennsylvania limited Partnership

PETITIONER

v.

THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COMMONWEALTH COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTION(S) PRESENTED

Did the Special Masters constituting the Board of Viewers who heard this case below have such bias or prejudice against your Petitioner; the same being founded on personal knowledge of the Special Masters of disputed evidentiary facts, so that your Petitioner was denied due process pursuant to the 14th Amendment of the Constitution of the United States?

LIST OF PARTIES

Board of Property Assessment Appeals & Review

Allegheny County, Pennsylvania

South Fayette Township

South Fayette Township School District

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the highest state Court to review the merits appears at Appendix A to the Petition and is unpublished.

The Opinion of the Board of Viewers acting on behalf of the Board of Property Assessment, Appeals and Review appears at Appendix B and is unpublished.

The Opinion of The Court of Common Pleas of Allegheny County, Pennsylvania affirming the report of the Special Masters (Board of Viewers) appears at Appendix C and is unpublished.

JURISDICTION

The date on which the highest state Court decided this case was April 21, 1995, a copy of that decision appears at Appendix A.

A timely petition for Reargument was thereafter denied on the following date: May 31, 1995. A copy of the Order denying Reargument appears at Appendix D.

A timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was thereafter denied on the following date: March 12, 1996, and a copy of the Order denying such allowance appears at Appendix E.

An Extension of Time to file the Petition for a Writ of Certiorari was granted to and including July 25, 1996 on May 28, 1996 in Application No. A-967.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 14th Amendment of the Constitution of the United States provides, inter alia:

> "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of The United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

American Bar Association Code of Judicial Conduct; Cannon 3E(1) paragraph (1):

> "a Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, but not limited to instances where:
>
> (a) "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding..."
>
> Cannon 3B(7):
>
> "...A judge shall not initiate, permit or consider ex-parte communications, ...concerning a pending or impending proceeding..."

STATEMENT OF THE CASE

The Opinion of the Special Masters, being The Board of Viewers and set forth in Appendix B contains statements that reveal the bias of the Board of Viewers against your Petitioner. That bias is founded on knowledge of disputed evidentiary facts concerning the real property involved from an extra judicial source (or sources) indicating Ex-parte communications and/or investigations contrary to Cannons 3E(1) and 3B(7) of the Code of Judicial Conduct. Both the bias and the knowledge denied your Petitioner's right to due process pursuant to the 14th Amendment of the Constitution of the United States.

Your Petitioner owns real estate in South Fayette Township, Allegheny County, Pennsylvania. The property is assessed for real estate tax purposes to be taxed by the County, the Township and the Township's School District. This case began as an Appeal by Your Petitioner from a real estate tax assessment valuation by the Allegheny County Board of Tax Assessment, Appeals and Review which your Petitioner considered to be higher than permitted by applicable law.

The real estate tax appeal was heard by a Board of Viewers sitting without a jury and as "Special Masters" which Board has the same jurisdiction as the Court of Common Pleas of Allegheny County (the Court of original Jurisdiction in the Commonwealth of Pennsylvania). The function of the Board was to find an assessed value of the Property (based on a percentage of market value) from the testimony and evidence presented before it.

The statements in the opinion of the Board of Viewers which indicate a bias against your Petitioner and personal knowledge of evidentiary facts in dispute are as follows:

On page 25 of the Masters' Report (see Appendix B) under paragraph (d) location factor, the Masters state:

> "There is a rote expression in the expert real estate appraisal vernacular that the three most important factors in determining market value are LOCATION, LOCATION, LOCATION. We are agreed on the importance of this factor, neither of appellants' witnesses presented any testimony to describe the subject property's location, and many factors which make it desirable for business investment. Your Masters know the site...
>
> From public Records, it is seen as a small one square mile borough with a 1990 population of 5,443. It has been a satellite town housing the labor force and businesses surrounded by some major industries since World War I and, very important in World War II. (sic?) I-79 has brought growth to the surrounding township...
>
> We conclude and find that the subject property is a prime location for business investment superior to Nell's Business Park." (emphasis supplied)

The second statement in the Opinion of the Masters that indicates a bias and an ex-parte communication occurs on page 30 of the

Report (Appendix B) where the Masters state:

> "The subject land and modular prefabricated buildings are in a business park contiguous to a fast growing area... The buildings are targeted for a special class of professional and small businesses." (emphasis supplied)

The third place in the Opinion where the Masters indicate bias, extra judicial knowledge and Ex-parte communications is in the very last statement of the Report (Appendix B p. 45):

> "In concluding our recommendations, we give consideration to the fact that Nell made appropriate personal opinion factor, percentage reduction adjustments considering the larger size and construction quality of his RIDC comparable buildings. Through we sustain Nell's market value recommendations, we also must note that we made no upward adjustment in market value for the superior location factor of Abele Business Park to meet the owner's target market, which in our opinion would not be fully serviced by the RIDC location." (emphasis supplied)

As stated in the Opinion of the Masters the principal witnesses who testified at the trial were the general partner of Your Petitioner (the owner of the property) one, William G. Corace, Abele's real estate appraiser, E. Lewis Averbach and the real estate appraiser of the South Fayette Township School District, Robert B. Nell, Jr. In the transcript of the hearing there is no

testimony by any of the witnesses concerning the location of the subject property (although real estate appraisers do testify as to the value of "comparable properties" and included in the concept of a "comparable property" is the opinion of the appraiser who must determine when he selects a "comparable property", that the location of the "comparable property" is, in his personal opinion reasonably equivalent to that of the property being appraised).

In the first extract from the "Masters Report" set forth above the Masters emphasize the location of the property. They specifically state that they "know the site" and find that the "subject property is a prime location for a business investment superior to Nell's Business Park". <u>There are no facts in the Record that support any of these statements by the Master</u>.

At no time did the Masters reveal to any of the parties in this case that they had any familiarity with the Abele site, that they knew the site, that they considered it a "prime location" (whatever the Masters may think that phrase means) or that "I-79 has brought growth to the surrounding township..." The only way the Master would know this information would be from ex parte communications from persons unknown to the parties appearing before them.

The Masters' conclusion concerning the subject property's "prime location" constitutes a direct statement of bias. If Abele's property has a prime location it must have a very high value.

In reviewing the quoted language, for the

Masters to make the statements concerning knowing the site and finding the property to be a "prime location" immediate questions and red flags are raised concerning what the Masters' are stating. What is it that the Masters' are saying when they state that they know the site? Do they know it in a geographical sense? Do they know it in an economic sense? Just what knowledge do they have that is separate or apart from the knowledge that was communicated in the testimony of the witnesses or the documentary evidence submitted as evidence? What facts do the Masters know that render the Abele property a prime location "superior" to Nell's Business Park? (Mr. Nell in his appraisal used comparable property from a Business Park located approximately 15 miles from the subject property). There is no evidence on the Record that would or could drive the Masters to reach such a judgment. These facts could only come from some ex parte knowledge or communication not divulged to the parties litigating before the Masters.

The second quote from the Masters' Report is more egregious than the first in demonstrating a bias. The Masters state that the subject land and building are located "contiguous to a fast growing area..." and that the buildings are "targeted for a special class of professional and small businesses." There is no statement in the Record as to what area the subject property is contiguous to nor is there any statement that it is fast growing. It is significant that there was no opportunity to examine the Masters on whether or not their statement concerning the fast growing area would help or hinder, increase or decrease, the value of the subject property.

With regard to the statement as to the market for leasing the space in the Abele property when reviewing the Record in this case this statement constitutes a mis-statement of the only facts concerning the useof the buildings.

Although not before this Court, in the transcript of the testimony and evidence, William G. Corace had introduced an Exhibit which stated that the buildings on the subject property constituted "flex-space" being a combination of office and warehouse space with a majority of non-office space. There is no mention that the buildings could be used for professional offices whatsoever. Further, the statement in the Masters' report presumes extra judicial knowledge concerning the Taxpayer's assumed marketing program for the property. Where did the Masters get this specialized knowledge? Is this knowledge in any way accurate? Although not directly stated the quotation from the Masters' report indicates a strong belief that the taxpayer could just as easily be operating a high yield gold mine as a real estate development of rental properties.

The last quote from the Masters' Report indicates the most evident effect of the Masters' bias. By stating that "...we made no upward adjustment in market value for the superior location factor of Abele Business Park to meet the owner's target market..." the Masters are stating that only through restraining their bias (based on information not on the Record) did they not find a value not exceeding that already found by the appraiser for the taxing body. Such restraint is admirable but fails to demonstrate an objective and impartial Judiciary.

The bias shown in the Masters' Report and based on extra judicial knowledge should not be permitted to stand.

REASONS FOR GRANTING THE PETITION

On Certiorari the Supreme Court of the United States considers cases where a State Court has decided an important Federal question in a way that conflicts with relevant decisions of the Supreme Court of The United States. In In Re Murchision, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) this Court stated:

> "A fair trial and a fair tribunal is a basic requirement of Due Process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a Judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision, circumstances and relationships must be considered. ...[T]hus the Judge whom Due Process requires to be impartial in weighing the evidence before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be trusted by adequate cross examination." (Emphasis supplied).

A case with a more similar bias to that in this case occurs in Johnson v. Mississippi, 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed. 2d 423 (1971). In Johnson, the trial Judge had a

bias against both civil rights litigants and lawyers. The Judge found a lawyer in contempt without a hearing. In a short opinion reversing the judgment below and remanding the case for a hearing on the counsel's alleged contempt, this Court wrote:

> "Trial before an unbiased Judge is essential to due process."

The American Bar Association Code of Judicial Conduct, if followed, should be sufficient to prevent the kind of bias that exists in this case. The Special Masters with extra judicial and ex parte knowledge should have disqualified themselves or, at least, advised the parties that they had such knowledge so that a timely Motion for Recusal could have been filed and heard. Unfortunately your Petitioner is now in a position where it must attempt to right a constitutional wrong after the wrong has been visited on it, rather than take the preventive action that should have taken place.

In Judicial Disqualification by Richard E. Flamm, Little Brown and Company, 1996 Mr. Flamm writes at 334:

> "Litigants are entitled to have their case decided by a Judge who can approach that case in an objective or impartial manner; a Judge who possesses personal knowledge of the evidentiary facts in dispute may not be able to meet this criterion. When a Judge or other judicial officer has personal knowledge of disputed evidentiary facts that has been acquired through an extra judicial source...state...authorities, as well as

the Code of the Judicial Conduct, prescribe disqualification."

The two judicial cannons that are involved in this case are 3E(1) and 3B(7). Cannon 3E(1) is:

> "(1) a Judge should disqualify himself in a proceeding in which his impartiality might be in question, including, but not limited to instances where:
>
> (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;..."

As stated above the Special Masters had personal knowledge of the location of the subject property as well as a personal bias as to the value of that location and the use to which your Petitioner has, in the Masters' minds, used the property.

Judicial Cannon 3B (7) is:

> "...a Judge shall not initiate, permit or consider ex parte communications, ...concerning a pending or impending proceeding..."

There is no way that the Masters in this case could have obtained the knowledge expressed in their opinion without ex parte communications.

Flamm applies this Cannon at page 326, regarding disqualification, as follows:

"As a general rule, however, to provide a legally cognizable ground for disqualification, a Judge's factual knowledge must be of evidentiary facts that are actually in dispute, and acquired outside the course of judicial proceedings that have been conducted before him."

Such ex-parte knowledge is evident in this case.

In Marshall v. Jerrico, Inc., 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed. 2d 182 (1980) Justice Marshall wrote:

> "Indeed, justice must satisfy the appearance of justice...and this stringent rule may sometimes bar trial by Judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties."

In the case before this Court the appearance is one of injustice not justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALPERN AND ALPERN

David F. Alpern

David F. Alpern

DATE: July 24, 1996